

a single Judge of the Supreme Court sitting in open Court has no jurisdiction to dismiss the appeal:

- (1) the order of dismissal is a final order determining the appeal in favour of the respondent: I can find no provision of law which states, expressly or impliedly, that such an order can be made by any authority other than the authority which can make a final order determining the appeal in favour of the appellant: and there is no doubt that the latter order can be made only by the Court of Appeal;
- (2) the order of dismissal involves the decision of the appeal within the meaning of Section 1150 (1) and therefore is excluded from the class of directions which may be made by a single Judge;
- (3) if no inference can be drawn from the Code or any other law now in force, as to the authority which can dismiss the appeal under Section 1239 (3), then by Section 3, the procedure and practice for the time being in force in the Supreme Court of Judicature in England shall, as near as may be, be followed and adopted: in England, the procedure and practice is to apply by motion to the Appellate Court to dismiss the appeal for want of prosecution (cf. e.g. *Charlton v. Charlton*, 16 C.D. p. 273).

My conclusion is that in the present case the respondent should have applied by motion to the Court of Appeal to dismiss the appeal for want of prosecution.

Counsel have agreed that the costs of the present application shall follow the event.

The respondent has failed in his present application; his motion must therefore be dismissed with costs.

Motion dismissed.

Solicitor for Respondent—*S. Shunmugam.*

Solicitor for Appellant—*S. Fung.*

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

January 23, 1935.

Re H. DANIEL.

[PENANG BANKRUPTCY No. 15 of 1934.]

Ordinance No. 44 (Bankruptcy) Section 47—Vesting of Property of Bankrupt.

The Municipal Commissioners of Georgetown, Penang, have established a Provident Fund for their employees and under the rules of that Fund the Com-

missioners periodically deduct 10% of the salary due to each member and pay such amount to the fund. This is known as the Contributions side of the Fund. The Commissioners also themselves contribute and pay to the Fund half yearly a sum equal in amount to the aggregate of the members' contribution during that half year. This is known as the Donations side of the fund.

Bankruptcy proceedings were taken against a member of the Georgetown Municipal Commissioners Provident Fund. Receiving and Adjudication Orders were made against him. Subsequently the Municipality dispensed with his services. On Motion made to the Court on behalf of the Petitioning Creditor.

Held that the Official Assignee could claim the Contributions side of the fund and that such part of the fund on the member's bankruptcy vested in the Official Assignee upon the member ceasing to be an employee of the Municipal Commissioners.

Motion.

An application was made by way of Motion on behalf of the Petitioning Creditor for an Order that the Official Assignee do declare and distribute a subsequent dividend in this Bankruptcy.

The facts and arguments are sufficiently shown in the Judgment.

Lim Cheng Ean for the Petitioning Creditor.
E. N. Taylor, Official Assignee.

Cur. Ad. Vult.

WHITLEY, J.—This was a motion on behalf of the petitioning creditor for an order that the Official Assignee do declare and distribute a subsequent dividend in the bankruptcy.

The material facts are short and are all admitted. The bankrupt was employed by the Penang Municipality. Receiving and adjudication orders were made against him on 20th April 1934 and his services were dispensed with by the Municipality at the end of that month. The amount standing to his credit in the Municipal Provident Fund was \$3,391.74 which sum was duly paid out to him. The Official Assignee took the view that the whole of this sum was protected from seizure by section 19(2) of Ordinance No. 135 (Municipal) and consequently did not vest in the Official Assignee. The bankrupt offered to furnish from this sum enough money to pay a composition of 50%. Proofs made by the eleven creditors for sums amounting to \$1,366.98 were admitted. The two creditors who attended the first meeting of creditors declined the composition offered. The bankrupt thereupon paid \$683 to the Official Assignee unconditionally and a dividend of 50% was declared and paid. For some reason which is not quite clear to me the actual amount handed to the Official Assignee as appears from the latter's statement dated 18th August 1934 was \$1,350 and the statement shows a balance remaining in the hands of the Official Assignee of \$536.96 after payment of costs and dividend. Counsel for the petitioning creditor contended that that balance must also be available for dividend. The Official Assignee took

the view that in law no part of the sum received from the Provident Fund vested in him and that consequently all that was properly available for dividend in the bankruptcy was such part of that sum as the bankrupt had voluntarily made available namely the \$683 required to pay a dividend of 50%.

The account of each contributing member to the Municipal Provident Fund is kept in two parts one comprising all contributions made by the member out of his salary and interest thereon and the other comprising all donations made by the Corporation and interest thereon. At the time the bankrupt ceased to be a member the amount to his credit in each of these parts was \$1,695.87. It is common ground that the part made up of "donations" is a gratuity which does not vest in the Official Assignee. The question raised by this motion is whether the other part made up of contributions out of salary is similarly protected.

The Official Assignee argued that the point is settled by authority. He relied upon the case of *Re Mahomed Arif*, 1926 S.S.L.R. 166 which decided that a gratuity granted by the Government under the Pensions (Gratuities) Ordinance 1926 is compensation granted by the Government within the meaning of section 55(3) of Ordinance 44 (Bankruptcy) but that the Court is precluded by section 8 of the Pensions (Gratuities) Ordinance from making an order for the payment of the gratuity or any part thereof to the Official Assignee. In that case the Court was only concerned with a gratuity. There was no question of any contributions out of salary and the considerations which apply to such contributions are so different from those which apply to a gratuity that I do not think the decision in that case can be regarded as binding except as regards that part of the Provident Fund which is made up of "donations." Accordingly I do not think it necessary to set out or consider the sections upon which that case turned.

It will, however, be necessary to consider what would be the position under the common law apart from the special provisions of any Statute or Ordinance. The rule is that the owner of property may on alienation qualify the interest of his alienee by a condition to take effect on the bankruptcy of the alienee, but cannot by contract or otherwise qualify his own interest by a like condition, determining or controlling it in the event of his own bankruptcy to the disappointment or delay of his creditors. *Mackintosh v. Pogose*, (1895) 1 Ch. 505. But the instrument creating the interest must use proper words of limitation to ensure that it does pass away from the alienee in the event of his bankruptcy, otherwise his interest whatever it may be will be divisible among his creditors. *Brandon v. Robin-*

son, (1811) 1 Rose 197. It follows then that in the absence of any special legislative enactment any moneys which are the absolute property of a person will in the event of his bankruptcy ordinarily become available for distribution among his creditors.

The Municipal Provident Fund is established by section 19 of Ordinance No. 135 (Municipal) and the Rules made thereunder for the Municipality of Georgetown Penang. Section 19(1) and (2) reads as follows:—

(1) The Commissioners, with the approval of the Governor in Council, may make rules for the establishment of a Superannuation and Provident Fund for the provision of payments or other allowances on death, superannuation, resignation, retirement or discharge to persons who have been in the employment of the Municipality, and the contribution of moneys out of the Municipal Fund for such Superannuation or Provident Fund.

(2) No payments or other allowances on death, superannuation, resignation, retirement or discharge made or granted to persons out of a Superannuation and Provident Fund nor the rights of any contributor acquired thereunder shall be assignable or transferable or liable to be attached, sequestrated or levied upon for or in respect of any debt or claim whatsoever.

The rules material to the present Motion are as follows:—

Rule 6. Whenever, from time to time, any amount on account of salary or wages shall become due and payable by the Corporation to a Contributing Member, the Corporation shall not pay the amount so due and payable in full to such contributing member, but shall deduct and retain thereout 10 per cent of such amount, and shall, as far as possible, simultaneously with the payment to such contributing member of the balance of such amount, pay to the Fund the amount deducted as aforesaid the amount so deducted and paid to the Fund shall be forthwith credited to the account of the Contributing Member with the Fund.

Rule 8 (1). The Corporation shall at the end of each and every half-year after the date of this scheme, contribute and pay to the fund a sum equal in amount to the aggregate of the sums which during the same half-year have been contributed thereto by the Contributing Members (under clauses 6 and 7). This contribution from the Corporation is hereinafter referred to as the donation.

Rule 9. A separate account shall be kept of each contributing member with the Fund, and such account shall be divided into two parts: the one to comprise all contributions made by such contributing member under clauses 6 and 7, and all interest thereon as hereinafter mentioned.

and the other to comprise all donations made by the Corporation as aforesaid, and all interest thereon as hereinafter mentioned.

Rule 13. Whenever a contributing member not having been guilty of fraud or dishonesty or misconduct shall cease to be in the employment of the Corporation by reason of the happening of any one of the following events, that is to say—retirement; death—there shall be paid to such contributing member or in case of his death, to his legal personal representatives, out of the fund the whole of the amounts standing at the time aforesaid to the credit of both parts of his accounts with the Fund.

Rule 14. Any contributing member retiring from the service of the Corporation with less than ten years completed continuous service before superannuation *bona fide* of his own accord and not to escape dismissal for fraud or dishonesty, or misconduct, shall be entitled to receive back the whole amount of his own contributions to the Fund with interest as aforesaid, and shall have no further claim on the fund.

Rule 17. Any contributing member dismissed from the service of the Corporation for fraud or dishonesty or misconduct, shall at the discretion of the Commissioners, forfeit all or any part of his contributions and lose all benefits from the Fund, except such return (if any) as may at such discretion be made to him out of his own contributions.

Rule 19. No benefit derivable by any contributing member or his representatives from the fund in respect of the donations by the Corporation shall be assignable on the happening of any event whereby the same or some part thereof, if belonging absolutely to such contributing member, would become vested in or payable to some other person or persons, to apply any moneys which may, from time to time, under the scheme become payable to such contributing member out of the donation by the Corporation in such manner as the Commissioners may in their absolute discretion think fit for the maintenance, support or benefit of such contributing member and his wife, family, relatives and persons dependent on him or any one or more of them.

The wording of section 19(2) of the Ordinance apparently does not contemplate and is not apt to cover the contingency of bankruptcy and it has been laid down as a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law (*Reg. v. Morris*, (1867) L.R. 1. C.C.R. 90). Furthermore if the construction of that section is ambiguous or doubtful on that point recourse may be had to the Rules made under the authority of the ordinance and if it is found that in the rules any particular construc-

tion has been put on the ordinance it is the duty of the Court to adopt and follow that construction. [*Ex parte Weir*, (1871) L.R. 6 Ch. at page 879].

The Rules draw a very definite distinction between the two parts of the Fund the one comprising the contributions made by the member and the other donations made by the Corporation. Rule 19 clearly contemplates the contingency of a contributing member becoming bankrupt and provides that upon the happening of such event the Corporation shall, as it would be entitled to do even apart from any legislative enactment, retain control over the "donation" which if it belonged absolutely to such contributing member would become vested in the Official Assignee. This donation does not belong absolutely to the contributing member and accordingly, following upon the principle laid down in *In re Wicks* (1881) 17 Ch. D. 70, *Ex parte Webber*, (1886) 18 Q.B.D. 111 and *Re K. Samikanoo*, (1927) S.S.L.R. 28, does not become vested in the Official Assignee on bankruptcy.

There is in the rules no corresponding provision with regard to that part of the fund which is made up of contributions out of salary and that being so it must I think follow that the ordinary common law rule applies. Subject only to the right of the Corporation to reimburse itself out of these moneys for any defalcations etc., this part of the fund is the absolute property of the contributing member. When the Corporation paid to the bankrupt this part of the amount standing to his credit with the Fund it became vested in the Official Assignee for the benefit of the creditors in accordance with the ruling in the case of *Re Byrne*, 9 Morrell 213 where after discharge the bankrupt recovered a sum of money for work and labour done by him before the commencement of the bankruptcy and it was held that the money belonged to the trustee.

At the request of Counsel I deferred giving judgment until after the Christmas Court Vacation in order that certain unreported local cases might be traced. The only one which appears to bear upon the point under consideration is that of *Klyne v. The Municipal Commissioners of Singapore*, Suit No. 75 of 1916. The facts from that case appear from the Reasons for Judgment given by Earnshaw, J. which are as follows:—

Under the amended rules made under Sec. 45 of the Municipal Ordinance 1896 the plaintiff as a servant of the Corporation became a contributing member to the Superannuation and Provident Fund. He was dismissed from his service for misconduct and the Commissioners under rule 17 of the aforesaid rules decided that he had forfeited all his contributions to the Fund with interest thereon and had lost all

benefits whatever thereunder. This rule provides *inter alia* that the Commissioners may at their discretion direct the repayment to him of the whole or part of his contributions to the fund as the Commissioners shall in their absolute discretion shall think fit. Exercising that absolute discretion, the Commissioners have not thought fit to repay any sum to the plaintiff. The plaintiff now claims the amount which stood to his credit. It appeared to me that the whole question for the Court was whether the evidence proved that the plaintiff had been guilty of misconduct which involved pecuniary loss. On the evidence I found that he had, and that being so I held that it could not interfere with the absolute discretion of the Commissioners. I added that on the facts before me I might, if I had had the power, have inflicted a more lenient punishment than absolute forfeiture and qualified this by saying that possibly the Commissioners had other information on which they acted. I did not however palliate the misconduct of the plaintiff, which I characterised as being very gross. In weighing the evidence I carefully considered the fact that Counsel for the plaintiff refrained from calling him as a witness on his own behalf."

The case went to the Court of Appeal which allowed and ordered that judgment be entered for the plaintiff for \$1,144.59. There was no written judgment and as one can only surmise the reasons which led the Court to allow the Appeal, this decision cannot be regarded as conclusive as to the several rights of a contributing member but it would seem to indicate that the Court took the view that a contributing member has an absolute right to repayment of such part of his contributions to the Fund as cannot be properly retained to make good losses sustained by the Commissioners by reason of his defalcations or misconduct. Put at its lowest the decision is consistent with the view that in the absence of any such losses the part of the fund made up of such contributions is the absolute property of the contributing member and on his bankruptcy vests in the Official Assignee. To hold otherwise would in my opinion be grossly inequitable. The contributing member in effect uses the fund as his savings bank with which he deposits each month part of his salary with the pleasing knowledge that if he behaves himself he will get 100% interest in the form of the donation added by the Corporation. If these savings were deposited with an ordinary bank they would be available for his creditors in the event of his bankruptcy and I can see no reason why, in the

absence of any clear legislative enactment to the contrary, any distinction should be drawn in the case of savings deposited with the Corporation. An employee who required the whole of his salary to maintain himself might borrow each month in order to be able to make his contribution to the fund. It would be clearly most unfair if when he became bankrupt he could be allowed to turn round and say to the lender "You cannot touch these contributions which were really made up of moneys lent by you merely because they have been kept by the Corporation in this Provident Fund."

I wish to make it clear that I am only deciding what is the position as regards the part of the fund made up of contribution when such moneys become payable to the contributing member under Rule 13, that is upon his ceasing to be employed. No argument was addressed to me as to what the position as regards this part of the fund would be if a contributing member became bankrupt and continued to be employed and I express no opinion on that point which does not arise in the present case.

I direct that subject to costs such moneys as are in the hands of the Official Assignee having been paid out of the part of the fund comprised of contributions from salary are available for paying a further dividend.

Order accordingly.

Solicitors for the Petitioning Creditor—
Cheng Ean & Soon Chee.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, J.

December 4, 1934.

REX vs. LEE SIONG KIAT.

[SINGAPORE MAGISTRATE'S APPEAL No. 42 of 1934]

Partnership—Relationship between partners—Criminal Breach of Trust by partner—Constructive possession of monies.

The relationship between partners is such that one of them may be entrusted with property on behalf of the partnership and may accordingly commit criminal breach or such trust within the meaning of the Penal Code. Criminal breach of trust can be committed with respect to moneys only constructively in the possession of the accused.

Appeal from a decision of the District Judge who convicted the accused on three charges of criminal breach of trust. Apart from the facts set out in the Judgment reported below, the evidence established that the position with regard to the 2nd and 3rd charges was as follows. The Hock Hoe Hup Kee Kongsí had deposited with the K.P.M. a guarantee fund of \$5,000 – on which the K.P.M. yearly paid the Kongsí the sum of \$250/- as interest. This interest for the year 1932 was not paid to the accused in cash but was